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In the Supreme Court of the United States

OCTOBER TERM, 1990

INTERNATIONAL PRIMATE PROTECTION LEAGUE AND ITS MEMBERS, ET AL., PETITIONERS

v.

ADMINISTRATORS OF TULANE EDUCATIONAL FUND, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL INSTITUTES OF HEALTH

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA L. HERWIG
MATTHEW M. COLLETTE
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether federal agencies may remove state court actions to the federal courts pursuant to 28 U.S.C. 1442(a)(1).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 895 F.2d 1056.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1990 (Pet. App. A1-A15). A petition for rehearing was denied on April 13, 1990 (Pet. App. A24-A25). The petition for a writ of certiorari was filed on July 12, 1990, and was granted on November 26, 1990, limited to the question whether 28 U.S.C. 1442(a) permits a federal agency to remove

a civil action from state court to federal court. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. 1442(a) provides, in pertinent part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any act of Congress for the apprehension or punishment of criminals or the collection of revenue.

STATEMENT

This case concerns the care and custody of macaque monkeys that were the subject of experiments to determine whether the monkeys recovered use of limbs after nerves to the limbs were severed. The experiments were conducted during 1981 by a private research facility—then called the "Institute for Behavioral Research," later the "Institutes for Behavior Resources" (IBR)—under funding from the National Institutes of Health (NIH). The purpose of the experiments was to gain information that could be used in rehabilitating human patients with neurological damage. Pet. App. A2.

In September 1981, Maryland police officers executed a warrant at the facility where the monkeys were then being kept and seized the monkeys, acting upon allegations that the monkeys were being mistreated. Pet. App. A3. Shortly thereafter, pursuant

to a court order, NIH assumed custody of the monkeys pending resolution of a criminal complaint against Dr. Edward Taub, chief of IBR's Behavioral Biology Center. *Id.* at A3-A4; IBR App. 6a-7a.[1] After that order expired, NIH continued to act as the monkeys' principal custodian with the consent and cooperation of IBR, the monkeys' owner. Pet. App. A4; IBR App. 7a. Throughout this period, NIH at its own expense housed and fed the monkeys and provided them with routine veterinary care. IBR App. 7a, 8a; NIH App. 3a.

In December 1981, petitioners and other plaintiffs filed an action against IBR and NIH, among others, in the Circuit Court for Montgomery County, Maryland. The complaint alleged that the defendants had violated Maryland animal cruelty laws and the federal Animal Welfare Act, 7 U.S.C. 2131 *et seq.*, and asked the court to grant plaintiffs custody of the monkeys. See *International Primate Protection League* v. *Institute for Behavioral Research, Inc.*, 799 F.2d 934, 937-938 (4th Cir. 1986), cert. denied, 481 U.S. 1004 (1987). NIH removed the case to federal court without opposition, and then IBR moved to dismiss the complaint for lack of standing. 799 F.2d at 938, 940. The district court granted the motion to dismiss on grounds of standing, and the Fourth Circuit affirmed. *Id.* at 937.

In June 1986, while the Fourth Circuit case was pending, NIH transferred the monkeys to Tulane University's Delta Regional Primate Research Center

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[1] "IBR App." refers to the appendix to the brief in opposition to certiorari filed by respondent Institutes for Behavior Resources. "NIH App." refers to the appendix to the brief in opposition to certiorari filed by respondent National Institutes of Health.

in Covington, Louisiana (Delta Center). Under NIH's letter of agreement with the University, the Delta Center was to "act[] strictly as an aide to NIH in its role as . . . custodian [for the monkeys]." IBR App. 8a; NIH App. 1a. NIH paid the Delta Center for housing the monkeys and was reimbursed by IBR for a portion of these costs. IBR App. 8a; NIH App. 3a.

In December 1988, NIH announced plans to euthanize three of the monkeys pursuant to the recommendation of a panel of independent experts. As part of the euthanasia procedure, which would involve deep surgical anaesthesia, NIH planned to conduct humane, nonpainful procedures by which it hoped to gain knowledge that could lead to improvements in rehabilitation therapy for persons who have suffered brain or spinal cord damage, strokes, or similar injuries. Pet. App. A4.

Before NIH could carry out the euthanasia, petitioners sued NIH, IBR, and the Administrators of the Tulane Educational Fund (Tulane) in the Civil District Court for the Parish of Orleans in Louisiana. Pet. App. A30-A31. Petitioners sought an order enjoining the enthanasia and granting custody of the monkeys to petitioners or members of the U.S. Congress. *Id.* at A38-A39. After the state court granted petitioners' motion for a temporary injunction barring euthanasia of the three monkeys (IBR App. 1a), NIH removed the case to the United States District Court for the Eastern District of Louisiana pursuant to 28 U.S.C. 1442(a)(1). J.A. 1, 16, 17.[2]

[2] Petitioners sought injunctive relief against the "agents and officers of NIH, IBR, and the administrators of the Tulane Education Fund." Pet. App. A30-A32. The state court's temporary restraining order named only the administrators, "their agents, attorneys and servants" (IBR App. A), because at the time of issuance the other defendants had not been served.

Petitioners moved to remand the case, arguing that the case had been improperly removed. J.A. 1-2. NIH filed motions to dismiss the case on the grounds that petitioners lacked Article III standing and that their suit was barred by res judicata, the Supremacy Clause, and sovereign immunity. The district court denied both NIH's and petitioners' motions. Pet. App. A17, A18.

Pending consideration of those motions, the district court issued a temporary restraining order "enjoining the Administrators of the Tulane Educational Fund, the National Institutes of Health, and their agents, attorneys and servants, from inhumane treatment towards, or euthanasia or other destruction" of the monkeys. Pet. App. A16. The district court later refused to vacate its order when NIH objected that the order had exceeded the twenty-day limit on temporary restraining orders imposed by Federal Rule of Civil Procedure 65(b). Pet. App. A4.

NIH and Tulane appealed the district court's order to the United States Court of Appeals for the Fifth Circuit, arguing that the order had become the functional equivalent of a preliminary injunction appealable under 28 U.S.C. 1292(a)(1). Pet. App. A4. On appeal, NIH and Tulane argued that petitioners had not demonstrated a likelihood of success warranting preliminary injunctive relief because they (1) lacked Article III standing, (2) had failed to state a cause of action under Louisiana law, and (3) were barred by the Supremacy Clause from securing injunctive relief under state law against NIH's planned research activities. *Id.* at A5.

The court of appeals agreed that petitioners lacked Article III standing and accordingly did not address respondents' other arguments. Pet. App. A5-A11, A15.[3] The court rejected petitioners' argument that the case was improperly removed. Relying on Fifth Circuit precedent, the court held that federal agencies are entitled to remove state court actions pursuant to 28 U.S.C. 1442(a)(1). Pet. App. A12-A13 (citing *Smith* v. *City of Picayune*, 795 F.2d 482 (1986)). The court further held that NIH had a sufficient interest in this case to invoke that provision. Pet. App. A13-A15.

A petition for rehearing was denied, Pet. App. A24-A25, and petitioners filed a petition for certiorari presenting three questions: whether the Fifth Circuit properly ruled that (1) an agency may remove an action under 28 U.S.C. 1442, (2) NIH had a sufficient interest in the action to remove it, and (3) petitioners lacked standing. This Court granted certiorari limited to the first question. 111 S. Ct. 507 (1990).

SUMMARY OF ARGUMENT[4]

1. a. Section 1442(a)(1) authorizes removal by "any officer of the United States or any agency thereof." That language may reasonably be read to

[3] The appendix to the petition omits several lines from the relevant portion of the court of appeals' decision. Compare Pet. App. A8 with 895 F.2d at 1060 (text accompanying note 4).

[4] As an initial matter, it is not clear that the Court can properly decide the only question on which it granted certiorari. The court of appeals below ruled—correctly, in our view—that petitioners lacked Article III standing to maintain their suit. Pet. App. A15 ("As federal court jurisdiction is limited by the constitution, the plaintiffs' failure to allege injury sufficient to satisfy Article III standing requirements is fatal to their suit."); see *id.* at A5-A11. Although petitioners sought review of that question, see Pet. i, this Court limited its grant of certiorari to the court of appeals' ruling on removal. 111 S. Ct. 507 (1990). In the present posture of the case, therefore, petitioners lack Article III standing. If they lack Article III standing, then they lack Article III standing to litigate further before this or any other federal court, except to seek review of the standing ruling and until they have secured such review. See *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *United States* v. *Corrick*, 298 U.S. 435, 440 (1936). In particular, given that petitioners lack Article III standing, they have no standing to litigate and secure a decision from this Court on the propriety of removal, since this Court must satisfy itself that the requirements of Article III—including standing—have been met. See *Bender*, 475 U.S. at 541.

This is not an academic quibble. One purpose of standing is to ensure the concrete adverseness necessary to proper presentation of issues, see *Bender*, 475 U.S. at 542. Yet here the Court would be resolving the removal question in a context in which the court below specifically found the injury in fact necessary to such adverseness to be lacking, Pet. App. A5-A11; see *Valley Forge Christian College* v. *Americans United for Separation of Church & State*, 454 U.S. 464, 486 (1982)—a finding this Court has declined to review. Given the unreviewed decision on standing by the court below, any decision by this Court on removal will be rendered in the context of a case that is outside the bounds of Article III. While this Court has jurisdiction to decide that cases are not properly within Article III, it is difficult to see how the Court can accept the proposition that a case before it is not within Article III—the effect of leaving the standing decision below unreviewed—and nonetheless go on to issue an opinion on some other ground.

authorize removal by any agency of the United States as well as by any officer of the United States. Contrary to petitioners' contention, neither the word "persons" nor the word "him" used elsewhere in the

provision plainly indicates an intention to limit those entitled to remove to natural persons.

Even if this Court were to read the opening clause of Section 1442(a)(1) more narrowly—as authorizing removal only by an officer of the United States or by an officer of an agency of the United States—the present action would still be removable under a natural reading of the second clause of Section 1442(a)(1). That clause goes on to authorize removal by a "person acting under" the federal officer. NIH is a "person acting under" such an officer, and therefore properly invoked this provision in removing the action brought against it in state court.

Moreover, interpreting Section 1442(a)(1) to authorize removal by federal agencies accords with the overall structure of the statute. Section 1442 was designed to afford a comprehensive right of removal in cases challenging the conduct of the federal government. This Court has accordingly recognized that Section 1442(a)(1) embodies Congress's decision that "federal officers, *and indeed the federal government itself*, require the protection of a federal forum." *Willingham* v. *Morgan*, 395 U.S. 402, 407 (1969) (emphasis added). Because the federal government acts largely through its agencies, Section 1442(a)(1) should be construed to authorize them to remove state court actions to the federal courts.

b. The legislative history, though not decisive, supports our construction of Section 1442(a)(1). Although earlier removal provisions were drafted with reference to federal officers, this merely reflects the fact that, at the time of enactment, federal officers, and not federal agencies, were being sued. The significant aspect of the history of these various removal provisions is that each was founded on the need to "maintain the supremacy of the laws of the

United States." *Colorado* v. *Symes*, 286 U.S. 510, 517 (1932). In contrast to earlier provisions, Section 1442 was enacted at a time when numerous federal agencies could be sued in state courts. The extension of the right of removal to federal agencies in the language of Section 1442(a)(1) reflected a logical response to this development.

c. Construing Section 1442(a)(1) to authorize removal by federal agencies is necessary to avoid absurd results that would flow from a contrary interpretation. In this case, for example, the officers of NIH would be prevented from removing this case even though they were expressly subject to the injunctive relief sought and obtained by petitioners. Congress could not have intended the availability of a federal forum to turn on petitioners' selection of NIH as a defendant, rather than its officers, particularly when petitioners sought relief against the officers. Petitioners have suggested no plausible reason why Congress would have wanted to afford a right of removal to federal officers, while denying such a right to federal agencies. Their particular brand of literalism ultimately makes no sense.

d. As this case also shows, in many contexts there is no meaningful distinction between actions by an agency and actions by an officer of the agency. This Court has recognized as much on at least two occasions. Both cases, like this one, concern the circumstances under which federal agencies can be sued. Similarly, Congress in several statutes has waived sovereign immunity to certain actions brought in state court and expressly permitted such actions to name either agencies or officers as defendants. Congress certainly did not intend the removal of these suits to turn on the fortuity of which entity was named.

2. Petitioners' arguments that (1) the issue of removal in this case is *res judicata* and (2) NIH lacked a sufficient interest in this case to remove it are beyond the scope of this Court's grant of certiorari and in any event are without merit. The removal issue under Section 1442(a)(1) was neither raised nor decided in the Fourth Circuit decision on which petitioners' *res judicata* argument relies. Their insufficient-interest argument is defeated by their own decision to name NIH as a defendant and to base their entire complaint on alleged misconduct by NIH. In addition, both the record in this case and NIH's statutory mandate show that NIH has a vital interest in this case.

ARGUMENT

I. FEDERAL AGENCIES MAY REMOVE STATE COURT ACTIONS TO FEDERAL COURT PURSUANT TO 28 U.S.C. 1442(a)(1)

A. The Language of Section 1442(a)(1) May Fairly Be Read to Authorize Removal by Federal Agencies

NIH invoked Section 1442(a)(1) to remove to federal court the suit that petitioners brought against it in Louisiana state court challenging NIH's care and custody of a group of macaque monkeys. Section 1442 provides in relevant part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office * * *.

The question is whether this provision may be invoked by federal agencies.

We believe that a natural reading of the statutory language leads to the conclusion that Section 1442(a)(1) may be relied upon by federal agencies as well as federal officers. There are two routes to this destination. The first route relies on the opening clause of Section 1442(a)(1), which authorizes removal by "[a]ny officer of the United States *or any agency thereof.*" 28 U.S.C. 1442(a)(1) (emphasis added). NIH is an agency of the United States, see 42 U.S.C. 202, 281(a); 28 U.S.C. 451, and therefore may remove an action brought against it in state court. See, *e.g.*, *IMFC Professional Servs. of Florida, Inc.* v. *Latin American Home Health, Inc.*, 676 F.2d 152, 156 (5th Cir. 1982).

We fully recognize that this is by no means the only possible reading of the opening clause. The phrase "or any agency thereof" may alternatively be read as part of the prepositional phrase that precedes it, so that the clause authorizes removal by an "officer of the United States" or by an "officer of * * * any agency thereof." See, *e.g.*, *Lovell Mfg.* v. *Export-Import Bank*, 843 F.2d 725, 733 (3d Cir. 1988). For the reasons set forth below, we believe that the Fifth Circuit correctly resolved this ambiguity in favor of the former reading, which is consistent with the statute's purpose of affording "the federal government * * * the protection of a federal forum." *Willingham*, 395 U.S. at 407.

If this Court disagrees with that interpretation, a natural reading of the second clause of Section 1442(a)(1) still permits NIH to remove this action. By its terms, the second clause authorizes removal by a "person acting under" an officer of the United States. The activities of NIH are subject to the direction and

control of the Director of NIH, an officer of the United States, see 42 U.S.C. 282(a), who in turn answers to the Secretary of Health and Human Services (*ibid.*) NIH is thus a "person acting under" a federal officer, and accordingly is expressly authorized to remove an action under Section 1442(a)(1).

Since every executive agency acts under *some* officer of the United States, this reading of Section 1442(a)(1) would lead to the general conclusion that such agencies—as well as their officers—may rely on the statute to remove actions to federal court. This result does not prove too much, but instead proves just enough. It is the result suggested by the purpose of the statute, see pp. 16-21, *infra*; since it also rests on a natural reading of the statutory text, that reading should be adopted by this Court.

Contrary to petitioners' contention (Pet. Br. 9-10), Congress's use of the word "persons" to refer to those entitled to remove does not indicate that only *natural* persons may invoke Section 1442(a)(1). In fact, the general rule is that the meaning of "person" is not confined to natural persons. See 1 U.S.C. 1. The precise scope of the term depends on its context: "The word 'person' * * * is not a term of art with a fixed meaning wherever it is used." *Pfizer Inc.* v. *India*, 434 U.S. 308, 315 (1978).[5] Thus, the Court

[5] On some occasions, the Court has said "in common usage, the term 'person' does not include the sovereign [and] statutes employing the phrase are ordinarily construed to exclude it." *United States* v. *Cooper Corp.*, 312 U.S. 600, 604 (1941); accord *United States* v. *Mine Workers*, 330 U.S. 258, 275 (1947). In so stating, however, the Court has emphasized that there is "no hard and fast rule of exclusion," *Cooper*, 312 U.S. at 604-605. In addition, the Court has more recently indicated that the rule normally should apply only "where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage," *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667 (1979), and that "much depends on the context" (*ibid.*). Accord 3 C. Sands, *Sutherland Statutes and Statutory Construction* § 62.02, at 72 (4th ed. 1974). The rule thus should not be applied in interpreting Section 1442(a)(1), which does not impose a burden or limitation but instead was enacted to afford the federal government the benefit of a federal forum for challenges to actions "under color of * * * office."

has interpreted the word "person" in the United States Code to include governmental agencies. See, *e.g.*, *Jefferson County Pharmaceutical Ass'n Inc.* v. *Abbott Laboratories*, 460 U.S. 150, 154-170 (1983) (purchases by state public corporation and other state instrumentalities subject to Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(a) and (f)); see also *Estate of Wycoff* v. *Commissioner*, 506 F.2d 1144, 1151 (10th Cir. 1974) (United States a "person" for purposes of federal tax code provision); *Ruhl* v. *Railroad Retirement Bd.*, 342 F.2d 662, 666 (7th Cir.) (Department of Army and other "governmental bodies" are "person[s]" under Railroad Retirement Act of 1937, 45 U.S.C. 228b(a)), cert. denied, 382 U.S. 836 (1965).[6] In other settings, the

[6] See also *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658 (1978) (municipality is a "person" under 42 U.S.C. 1983); *Georgia* v. *Evans*, 316 U.S. 159, 161 (1942) (holding that State was a "person" entitled to sue under Section 7 of Sherman Act and rejecting argument that "the word 'person' * * * could not include a governmental body"); *Ohio* v. *Helvering*, 292 U.S. 360, 370-371 (1934) (state agencies are "person[s]" under federal liquor tax laws); *Stanley* v. *Schwalby*, 147 U.S. 508, 517 (1893) (United States is a "person" under state laws, even if otherwise immune from their operation); *Employment Dev. Dep't* v. *United States Postal Serv.*, 698 F.2d 1029, 1032-1033 (9th Cir. 1983) (Postal Service a "person" under state law provision); cf. *United States*

Court has reached a contrary conclusion. See, *e.g.*, *Will* v. *Michigan Dep't of State Police*, 109 S. Ct. 2304 (1989). The point is this: the use of the word "persons" in Section 1442(a) does not, as petitioners beguilingly suggest, inexorably limit the scope of the statute to individuals.[7]

Indeed, the remainder of Section 1442(a) strongly suggests that the "persons" who may remove an action under that Section are not limited to natural persons. Included among the listed "persons" who may remove an action under Section 1442(a) is "[a] property holder whose title is derived from [an officer of the United States]." 28 U.S.C. 1442(a)(2). Such property holders are obviously not limited to natural persons, but include other entities that might hold property, such as corporations, partnerships, and trusts. The same word "persons" in Section 1442(a) surely cannot mean one thing when read with subsection 1442(a)(2) (where it plainly includes non-natural persons) and another when read with subsection 1442(a)(1).

Petitioners similarly err in relying on the presence in Section 1442(a)(1) of the pronoun "him." See

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v. *Yellow Cab Co.*, 340 U.S. 543, 553-556 (1951) (in Federal Tort Claims Act actions, United States subject to being impleaded under Fed. R. Civ. P. 14, providing for service of process upon a "person" not a party to main action).

[7] That Congress deemed it necessary in the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, expressly to exclude "an agency" from the definition of "person" obviously does not indicate, as petitioners would have it, that Congress drew a sharp "distinction between 'persons' and 'agencies'" elsewhere in the Code (Pet. Br. 9). On the contrary, it seems more reasonable to infer that Congress believed that "person" otherwise would be construed to include an agency, in the absence of Congress's expression of a contrary intent.

Pet. Br. 10.[8] The masculine form of the pronoun is commonly used to refer to entities denominated elsewhere in a statute as "persons." For example, Section 4(a) of the Clayton Act authorizes private actions by "any person who shall be injured in *his* business or property" and provides for recovery of "threefold the damages by *him* sustained," 15 U.S.C. 15(a) (emphasis added).[9] Any argument that this wording limits those entitled to sue to natural persons is defeated by Section 1(a) of the Act, which defines "person" to include corporations and associations, 15 U.S.C. 12(a), and by this Court's holding in *Pfizer*, *supra*, that the term "person" also includes a foreign government. See also *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396-397 (1906).

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[8] Petitioners' argument on this score only applies to our reading of the first clause of Section 1442(a)(1) as affording agencies a right of removal. Even if petitioners are correct in the significance they ascribe to the use of the pronoun "him," an agency may still remove an action under Section 1442(a)(1) as a "person acting under" an officer of the United States. Only if petitioners are correct both in their limitation of "persons" *and* "him" to natural persons can they prevail.

[9] See also, *e.g.*, Robinson-Patman Anti-Discrimination Act, 15 U.S.C. 13(b) ("nothing herein contained shall prevent a *seller* rebutting the prima-facie case thus made by showing that *his* lower price or the furnishing of services or facilities * * * was made in good faith") (emphasis added); Federal Water Pollution Control Act, 33 U.S.C. 1321(b)(5) (requiring "[a]ny *person* in control of a vessel or of an onshore facility or an offshore facility" to notify government of oil spill "as soon as *he* has knowledge of" spill) (emphasis added); 33 U.S.C. 1321(a)(7) (defining "person" to include non-natural entities).

Petitioners' final argument in support of the "plainness" of their reading of Section 1442(a)(1) is that Congress could have drafted the provision more clearly to permit removal by federal agencies. Pet. Br. 9. This argument is self-defeating. Congress likewise could have drafted the provision more clearly to prohibit such removal, for example, by using the term "individuals" instead of "persons" to describe those entitled to removal under the provision. Petitioners' argument that Congress could have drafted the statute more clearly merely confirms the ambiguity of the language that Congress did enact. Cf. *Young* v. *Community Nutrition Institute*, 476 U.S. 974, 980-981 (1986).

Petitioners' arguments as to the purported "plainness" of Section 1442(a)(1) suffer from a more fundamental deficiency. While we certainly agree that plain language should be given its plain meaning, the proper construction of Section 1442(a)(1) is not readily apparent from the text alone. In such a case, the statute must be read as a whole and in light of its purpose. *E.g.*, *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). In the context of this very statute, the Court has specifically warned that the statutory purpose "should not be frustrated by a narrow, grudging interpretation of section 1442(a)(1)." *Willingham*, 395 U.S. at 407. See also *Symes*, 286 U.S. at 517 (Section 1442 should be "liberally construed to give full effect to the purposes for which it was enacted"). Under these principles, Section 1442(a)(1) should be interpreted—as a natural reading of its text permits—to authorize removal by federal agencies.

Despite its title, the scope of Section 1442 clearly is not limited to actions against federal officers.[10] Section 1442 expressly allows former officers and persons who hold title under federal officers to invoke the provision. 28 U.S.C. 1442(b), 1442(a)(2). Beyond this, subsections (a)(1), (a)(3), and (a)(4) broadly authorize removal of state court suits challenging actions of the Executive, the Judiciary, and the Legislature. The comprehensive reach of Section 1442—covering all three branches, former officers, and persons acting under officers—strongly suggests that Congress intended to allow removal of the broad array of governmental actions taken under color of office.[11]

That intention has guided this Court's decisions construing Section 1442 and its statutory predecessors. The Court's definitive description of the pur-

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[10] Here, as is often the case, the statutory title is not a reliable guide to interpretation. See, *e.g.*, *United States* v. *Minker*, 350 U.S. 179, 185 (1956); *Brotherhood of R.R. Trainmen* v. *Baltimore & O. R.R.*, 331 U.S. 519, 528-529 (1947); *United States* v. *Union Pac. R.R.*, 91 U.S. 72, 82 (1875).

[11] Considering only the structure of Section 1442(a), it might be thought that subsection (a)(1) concerns solely the executive branch, since subsections (a)(3) and (a)(4) address the judicial and legislative branches, respectively. From the history of Section 1442, however, it is clear that "subsections (2)-(4) of § 1442(a) are largely the 'residue' of the pre-1948, more limited removal statutes now entirely encompassed by the general removal provision of the first clause of subsection (1)." *Mesa* v. *California*, 489 U.S. 121, 134 (1989). The retention of earlier, essentially redundant provisions in subsections (a)(2)-(a)(4) further suggests Congress's intention in enacting Section 1442 to afford a comprehensive right of removal with respect to state suits challenging all governmental actions.

pose of such provisions remains that set forth in *Tennessee* v. *Davis*, 100 U.S. 257, 263 (1880):

> [The government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State courts,—the operation of the general government may at any time be arrested at the will of one of its members.

A century later, the Court relied on this same passage in reemphasizing "the need to safeguard the exercise of legitimate federal authority." *Arizona* v. *Manypenny*, 451 U.S. 232, 241 n.16 (1981). See also *Mesa* v. *California*, 489 U.S. 121, 126 (1989) (quoting *Tennessee* v. *Davis*, *supra*).

Section 1442(a)(1) should not, consistent with the comprehensive scope of Section 1442 as a whole, be read to exclude removal of actions against federal agencies. Agencies, as they are defined for purposes of title 28, constitute a significant portion of the government and virtually the entire executive branch.[12] Thus, most "officers of the United States"

[12] 28 U.S.C. 451 provides in relevant part:

> As used in this title:
>
> * * * * *
>
> The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

within the meaning of Section 1442(a)(1) are also "officers of an[] agency."[13] Since an agency can act only through its members, every action of an agency officer under color of office is in some sense "agency action," and therefore arguably affords the basis for a suit against the agency. Interpreting Section 1442(a)(1) to preclude removal of state court challenges to such actions would defeat the obvious purpose of the provision.

Petitioners nonetheless argue (Pet. Br. 16-17) that reading Section 1442(a)(1) to permit removal by federal agencies would "broaden removal jurisdiction far beyond original jurisdiction." This is both in-

[13] Petitioners read Section 1442(a)(1) to permit removal by "an officer of the United States *or* an officer of an agency of the United States" (Pet. Br. 9). Nowhere, however, do petitioners explain the distinction they purport to discern between officers of the United States and officers of agencies of the United States. We are not aware of any statute or case law that draws such a distinction. By the same token, numerous statutes addressing suits by or against the Executive Branch draw no such distinction. For example, 28 U.S.C. 1345 grants original jurisdiction to district courts of actions "commenced by the United States, or by any agency or officer thereof." Other provisions throughout the U.S. Code employ the same or similar language and do not distinguish officers of the United States from officers of agencies. These provisions suggest that, at least for purposes of Section 1442(a)(1), all officers of agencies of the United States are officers of the United States. Petitioners' interpretation of Section 1442(a)(1) thus appears to render the phrase "any agency thereof" superfluous, in violation of a cardinal principle of statutory construction. 2A C. Sands, *Sutherland Statutes and Statutory Construction* § 46.06 (4th ed. 1974).

correct and irrelevant. It is incorrect because agencies, like officers, may invoke Section 1442(a)(1) only if they can allege a federal defense to the action sought to be removed. *Mesa*, 489 U.S. at 125-134. This requirement ensures that cases removed by agencies will normally require resolution of a federal issue, thereby fulfilling the purpose for which the right to removal was conferred. Moreover, petitioners' assumption that the scope of removal jurisdiction must be coextensive with original jurisdiction is belied by the existence of Section 1442. Under 28 U.S.C. 1441, federal courts already have removal jurisdiction over any suit as to which they could assert original jurisdiction. Section 1442 "serves to overcome the 'well-pleaded complaint' rule which would otherwise preclude removal [under Section 1441] even if a federal defense were alleged." *Mesa*, 489 U.S. at 136.[14]

Similarly beside the point is petitioners' argument (Pet. Br. 17-19) that "[t]his case presents issues of state law that are within the peculiar province of the Louisiana state courts." Every case removed under Section 1442 is based on state law; otherwise, it would have been removable under Section 1441. This is as true for cases removed by federal officers as it is for those removed by federal agencies. Petitioners' argument thus provides no basis for interpreting Section 1442(a)(1) to preclude removal by

[14] See also *Willingham*, 395 U.S. at 406 (Section 1442(a)(1) provides for removal of a suit involving "any act 'under color' of federal office, *regardless of whether the suit could originally have been brought in federal court*") (emphasis added); see also 14A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3727, at 459 (1981) (removal statute "may be exercised even though the action might not have been brought initially in a federal court."); 1A *Moore's Federal Practice* ¶ 0.164, at 385 (2d ed. 1986).

agencies. That was made clear by this Court long ago: "Nor is it any objection that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of [removal] jurisdiction." *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868) (quoted in *Mesa*, 489 U.S. at 129).

B. Interpreting Section 1442(a)(1) to Authorize Removal by Federal Agencies Is Consistent with Legislative History

The current version of Section 1442 was enacted in 1948 as part of a comprehensive revision and codification of the Judicial Code. *Willingham*, 395 U.S. at 406. As the Revision Notes to Section 1442 indicate, subsection (a)(1) derived from Section 76 of the prior Code, 28 U.S.C. 76 (1940), which was "limited to revenue officers engaged in the enforcement of the criminal or revenue laws." 28 U.S.C. 1442 Revision Notes. The earlier provision, according to the Notes, was "extended to apply to all officers and employees of the United States or any agency thereof." *Ibid.* This description, which represents the only legislative history that specifically addresses the scope of Section 1442(a)(1), suffers from the same ambiguity as the statutory language to which it refers.[15] The historical context in which

[15] Contemporaneous commentary on the 1948 codification suggests that Section 1442(a)(1) was understood to authorize removal by federal agencies. See H. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Probs. 216, 220-221 (1948) (arguing that federal courts should have original, in addition to removal, jurisdiction over "actions against agencies or officers of the United States based on a claim of illegality in conduct under color of

Section 1442(a) was enacted, however, supports interpreting that provision to allow removal by federal agencies.

Section 1442(a) is the latest of a series of removal provisions applicable to suits challenging the conduct of the federal government. In 1815, Congress enacted a temporary measure to enforce a trade embargo with England over the opposition of the New England states.[16] This provision was followed by passage of the Force Act of 1833 in response to South Carolina's attempt to thwart enforcement of federal revenue laws.[17] The Force Act was gradually expanded during the Civil War, Reconstruction, and on into the twentieth century to authorize removal by a broadening range of federal officials. *Willingham*, 395 U.S. at 404-405.[18]

their office"). See also H. Hart & H. Wechsler, *The Federal Courts and the Federal System* 1147-1150 (1953) (discussing Section 1442(a)(1) as designed "for the protection of federal officers and agencies and persons acting under them").

[16] The Act of Feb. 4, 1815, ch. 31, § 8, 3 Stat. 198, "allowed federal officials involved in the enforcement of the customs statute to remove to the federal courts any suit or prosecution commenced because of any act done 'under color' of [office]." *Willingham*, 395 U.S. at 405.

[17] The Act of Mar. 2, 1833, ch. 57, § 3, 4 Stat. 633, provided for removal of any suit or prosecution commenced against "any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States or under colour thereof."

[18] Congress passed another temporary measure during the Civil War, allowing "any officer, civil or military" to remove any suit for any "wrongs done or committed * * * during the present rebellion" under color of federal law. Act of Mar. 3, 1863, ch. 81, § 5, 12 Stat. 756; see *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247 (1868). This statute expired

In drafting these removal provisions, Congress referred to federal officers because they, and not federal agencies, were the ones being sued in state courts. Throughout this period, state court suits against federal officers were commonplace, while suits against government agencies were rare.[19] As a formal matter, these suits often named the officers in their personal capacity, even though they typically complained of

shortly after the Civil War, but the Force Bill continued in effect, and was expanded to apply to collectors of the internal revenue (Act of Mar. 7, 1864, ch. 20, § 9, 13 Stat. 17), to persons acting under color of the Elective Franchise Act (Act of Feb. 28, 1871, ch. 99, § 13, 16 Stat. 437-438 (repealed 1894)), to officers of either House of Congress (Act of Mar. 3, 1875, ch. 130, § 8, 18 Stat. 401), to court officers (Act of Aug. 23, 1916, ch. 399, 39 Stat. 532), to soldiers in the military service (Act of Aug. 29, 1916, ch. 418, § 3, Art. 117, 39 Stat. 669), to prohibition officers (National Prohibition Act of 1919, tit. II, ch. 85, § 28, 41 Stat. 316 (repealed 1935)), and finally to "[a]ny officer of the United States or any agency thereof, or person acting under him" (Act of June 25, 1948, ch. 646, § 1442, 62 Stat. 938). See generally F. Frankfurter & J. Landis, *The Business of the Supreme Court* 11 n.22, 61-69 (1928).

[19] See, *e.g.*, *Olney* v. *Arnold*, 3 U.S. (3 Dall.) 308 (1796); *Otis* v. *Bacon*, 11 U.S. (7 Cranch) 589 (1813); *Crowell* v. *McFadon*, 12 U.S. (8 Cranch) 94 (1814); *Meigs* v. *M'Clung's Lessee*, 13 U.S. (9 Cranch) 11 (1815); *Elliott* v. *Swartwout*, 35 U.S. (10 Pet.) 137 (1836). See generally *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 80-81 (1941); Note, *Developments in the Law—Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 840-842 (1957) (discussing actions against government corporations); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1943, 1943 & n.296, 1948 n.329 (1983) (discussing actions against government officers).

conduct carried out under color of office. See, *e.g.*, *United States* v. *Lee*, 106 U.S. 196, 210 (1882); cf. *Stanley* v. *Schwalby*, 147 U.S. 508, 512, 518 (1893). The purpose of this practice was to circumvent the doctrine of sovereign immunity, which generally barred suits that named the United States or one of its instrumentalities as a defendant.[20]

By 1948, when the current version of Section 1442 was enacted, the legal landscape had changed. Opportunities now existed to sue federal agencies in state courts, since, by this time, numerous federal agencies and federally controlled corporations were empowered "to sue and be sued," often in either federal or state court.[21] Congress's use of "sue and

[20] See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 387-389 (1939); *Kendall* v. *United States*, 37 U.S. 524, 610-611 (1838); *Bank of the United States* v. *Planters Bank*, 22 U.S. (9 Wheat.) 904 (1824); cf. *Olson* v. *United States Spruce Prod. Co.*, 267 U.S. 162, 466-467 (1929); *Sloan Shipyards Corp.* v. *United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922). Suits naming individual officers could still be defeated if the United States or an official who was not named was determined to be an indispensable party. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. at 386-388; *Webster* v. *Fall*, 266 U.S. 507, 510 (1929); *Guerich* v. *Rutter*, 265 U.S. 388, 391-392 (1924); *Warner Valley Stock Co.* v. *Smith*, 165 U.S. 28, 34 (1897).

[21] See, *e.g.*, 52 Stat. 72, 73 (1938) (Federal Crop Insurance Corporation); 50 Stat. 888, 890 (1937) (U.S. Housing Authority); 50 Stat. 697, 698 (Southeastern University); 50 Stat. 5, 7 (1937) (Farmers Home Corporation); 49 Stat. 684, 722 (1935) (Federal Housing Administrator); 48 Stat. 1246, 1256 (FSLIC); 48 Stat. 58, 60 (1933) (Tennessee Valley Authority); 47 Stat. 725, 735 (1932) (Federal Home Loan Bank); 47 Stat. 5, 6 (1932) (Reconstruction Finance Corporation). See generally *Final Report of the Attorney General's Committee on Administrative Procedure*, S. Doc. No. 8, 77th Cong., 1st Sess. 7-11 (1941); 1 K. Davis, *Administrative Law Treatise* §§ 1.5, 1.6 (2d ed. 1978).

be sued" provisions, in turn, contributed to a judicial "climate of opinion which * * * brought governmental immunity from suit into disfavor." *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 391 (1939); see also, *e.g.*, *Reconstruction Fin. Corp.* v. *J.G. Menihan & Co.*, 312 U.S. 81 (1941); *Federal Housing Admin.* v. *Burr*, 309 U.S. 242, 246-250 (1940); *Federal Land Bank* v. *Priddy*, 295 U.S. 229, 235 (1935).[22]

Against this backdrop, it is not surprising that the scope of Section 1442(a)(1) was expanded beyond officers of the United States to include "any agency thereof"—a logical response to the increased exposure of federal agencies to state court suits. Such an expansion was necessary, moreover, in light of the historical purpose of Section 1442(a)(1). That provision, like its "statutory forebears" (*Mesa*, 489 U.S. at 125), was "enacted to maintain the supremacy of the laws of the United States." *Symes*, 286 U.S. at 517. Though originating in times of national crises, each provision reflected the broader judgment

[22] The primary end result of these developments, as concerns litigation challenging governmental conduct, was enactment of the Administrative Procedure Act in 1946. See *Attorney General's Manual on the Administrative Procedure Act* 9 (1947). But Congress also responded to these events in the Judicial Code enacted two years later. Section 451 of the revised Code added a comprehensive definition of the word "agency" for purposes of the Code. In addition, Section 1345 added the word "agency" so that the provision, as revised, granted federal courts original jurisdiction over "suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." This revision reflected the growth in the number of agencies authorized to sue. See 28 U.S.C. 1345 Revision Notes.

that "federal officers, *and indeed the federal government itself*, require the protection of a federal forum." *Willingham*, 395 U.S. at 407 (emphasis added). Section 1442(a)(1) can only afford that protection if it is construed—as a natural reading of the text permits—to authorize removal by federal agencies.

C. An Interpretation of Section 1442(a)(1) That Precluded Removal By Federal Agencies Would Produce Absurd Results and Should Therefore Be Rejected

In deciding whether our reading or petitioners' reading of Section 1442(a)(1) is to be preferred, it is significant that petitioners' reading would produce results squarely at odds with the purpose underlying that provision. See *United States* v. *Brown*, 333 U.S. 18, 27 (1948).

For example, petitioners' interpretation would preclude removal in this case merely because petitioners named NIH as a defendant rather than the individuals against whom they sought and were granted relief. Although petitioners named NIH as the only federal defendant, they requested, and obtained, an injunction against both NIH and its "agents, attorneys, and servants" (Pet. App. A16). The injunction thus restrained actions by officers and employees of NIH "under color of * * * office" (28 U.S.C. 1442 (a)(1)), and exposed these individuals to contempt sanctions if they took the prohibited actions. Despite its caption, therefore, petitioners' suit was "[a] civil action * * * commenced in a State court against * * * officer[s] of the United States" (28 U.S.C. 1442(a)(1)). Congress surely did not intend removal of this case to be precluded solely by virtue of petitioners' artful pleading.

Moreover, petitioners' naming of NIH as defendant was improper. The general rule is that an agency cannot be sued in its own name absent congressional authorization. *Blackmar* v. *Guerre*, 342 U.S. 512, 514-515 (1952). Congress granted no such authority here. In addition, petitioners' state court action was plainly barred by sovereign immunity. See, *e.g.*, *Dugan* v. *Rank*, 372 U.S. 609 (1963). A waiver of sovereign immunity in the Administrative Procedure Act might apply to the activities of NIH, see 5 U.S.C. 702, but the waiver is expressly limited to actions brought in federal court.[23] For these reasons, interpreting Section 1442(a)(1) to bar removal in this and similar cases would reward plaintiffs for challenging actions of the federal government through suits brought in the wrong court against the wrong party. Such an absurd result tips sharply against adopting such an interpretation.

The incongruous results that would flow from such an interpretation are not limited to cases challenging agency activities that are immune from state court review. There are numerous governmental bodies—many of which are "agenc[ies]" as that term is defined for purposes of Section 1442(a)(1), see 28 U.S.C. 451, *supra* note 12—whose operations may be

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[23] See *Aminoil, U.S.A., Inc.* v. *California State Water Resources Control Bd.*, 674 F.2d 1227, 1233 (9th Cir. 1982) ("[T]he waiver of sovereign immunity in section 702 is expressly limited to actions brought 'in a court of the United States . . . .' The legislative history demonstrates that section 702 was not intended to effect a waiver of sovereign immunity for suits against the United States or its officers in state courts. 'The consent to suit is also limited to claims in the courts of the United States; hence, the United States remains immune from suit in state courts.' H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 11 (1976).").

the subject of state court attack pursuant to "sue and be sued" clauses. Some of these clauses provide for suits naming the agency, others for suits against the head of the agency.[24] Nothing in the text of these various provisions suggests that Congress intended to allow removal only with respect to suits of the

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[24] See, *e.g.*, 7 U.S.C. 942(b) (Rural Telephone Bank); 12 U.S.C. 1441(c)(8) (Federal Home Loan Bank Financing Corporation); 12 U.S.C. 1702 (Secretary of HUD with respect to certain statutory duties); 12 U.S.C. 2289(1) (Federal Financing Bank); 12 U.S.C. 3012(6) (National Consumer Cooperative Bank); 15 U.S.C. 77dd (Corporation of Foreign Security Holders); 15 U.S.C. 78ccc(b)(1) (Securities Investor Protection Corporation); 15 U.S.C. 634(b)(1) (Administrator of Small Business Administration); 16 U.S.C. 648c(b) (National Trust for Historic Preservation); 16 U.S.C. 831c(b) (Tennessee Valley Authority); 19 U.S.C. 2350 (Secretary of Labor with respect to trade adjustment assistance for firms); 20 U.S.C. 1132g-1(c)(2) (Secretary of Education with respect to housing and educational facility loans); 20 U.S.C. 3225(d)(3) (National Trust for Drug-Free Youth); 20 U.S.C. 4414(a)(3) (Board of Institute of American Indian and Alaska Native Culture and Arts Development); 22 U.S.C. 2199(d) (Overseas Private Investment Corporation); 22 U.S.C. 4604(j) (United States Institute for Peace); 25 U.S.C. 1496(a) (Secretary of Interior with respect to federal loan guarantees and related insurance for Native Americans); 33 U.S.C. 984(a)(3) (St. Lawrence Seaway Development Corporation); 38 U.S.C. 1820(a)(1) (Administrator of Veterans' Affairs with respect to housing and small business loans); 42 U.S.C. 294h(a)(2) (Secretary of Health and Human Services with respect to federally insured loans to graduate students in health professions schools); 42 U.S.C. 1404a (Secretary of HUD with respect to low-income housing); 42 U.S.C. 8105(b)(4) (Neighborhood Reinvestment Corporation); 45 U.S.C. 822(c)(5) (Secretary of Transportation with respect to Railroad Rehabilitation and Improvement Fund).

latter type.[25] Nor would such a result be logical. As in this case, state court suits for injunctive relief under any of these sue-and-be-sued clauses would, if successful, bind both the agencies and their officers. Cf. Fed. R. Civ. P. 65(d).[26]

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[25] In creating some governmental entities, Congress expressly provided for removal of actions against them. See, *e.g.*, 12 U.S.C. 632 (federal reserve banks); 12 U.S.C. 1452(e) (Federal Home Loan Mortgage Corporation); 12 U.S.C. 1730(k) (Federal Savings and Loan Insurance Corporation); 12 U.S.C. 1789(a)(2) (National Credit Union Administration Board); 12 U.S.C. 1819 (Federal Deposit Insurance Corporation); 12 U.S.C. 2277a-7(4)(B) (Farm Credit System Insurance Corporation); 12 U.S.C. 2278b-4(b) (Farm Credit System Financial Assistance Corporation); 12 U.S.C. 2279aa-14(3) (Federal Agricultural Mortgage Corporation); 22 U.S.C. 282f (International Finance Corporation); 22 U.S.C. 283f (Inter-American Development Bank); 22 U.S.C. 283gg (Inter-American Investment Corporation); 22 U.S.C. 284f (International Development Association); 22 U.S.C. 285f (Asian Development Bank); 22 U.S.C. 286g (International Monetary Fund and International Bank for Reconstruction and Development); 39 U.S.C. 401(1) (United States Postal Service). Most of these entities are corporations or other entities with respect to which, in the absence of a specific removal provision, doubt could arise as to whether they were "agenc[ies]" for purposes of 28 U.S.C. 451, and so entitled to invoke Section 1442(a)(1). See also 28 U.S.C. 1349 (regarding original jurisdiction over cases involving government corporations).

[26] See also La. Code Civ. Proc. Ann. tit. 1 ch. 2, art. 3605 (West 1961) (injunction "shall be effective against the parties restrained, their agents, employees, and counsel, and those persons in active concert or participation with them"); *Pettus v. Atchafalaya Wildlife Protective Society*, 351 So. 2d 790, 792 (La. Ct. App. 1977) ("An injunction [against] a corporation is a mandate to those responsible for the * * * corporation's affairs.").

There is a third category of cases in which interpreting Section 1442(a)(1) to preclude removal by federal agencies would produce absurd results. In several major environmental statutes, Congress has, under certain circumstances, waived the federal government's sovereign immunity from state environmental laws.[27] These provisions clearly contemplate state court suits against federal "agenc[ies]" within the meaning of Section 1442(a)(1). Many such suits will no doubt allege exclusively state-law claims and therefore fall outside the general removal provision, 28 U.S.C. 1441. Nonetheless, these suits will invariably raise important and sensitive issues regarding, for example, the scope of the waiver and the extent to which state requirements have been preempted. It is inconceivable that Congress intended to confide the resolution of such issues largely to the courts of the 50 States. Cf. *NLRB* v. *Nash-Finch Co.*, 404 U.S. 138, 147 (1971) ("For the Federal Government and its agencies, the federal courts are the forum of choice.").[28]

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[27] Clean Water Act, 33 U.S.C. 1323(a); Safe Drinking Water Act, 42 U.S.C. 300j-6; Clean Air Act, 42 U.S.C. 7418(a); Resource Conservation and Recovery Act, 42 U.S.C. 6961 (solid and hazardous wastes); 42 U.S.C. 6991f (underground storage tanks); 42 U.S.C. 6992e (medical wastes); and Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. 9620.

[28] Only one of these environmental statutes' waiver provisions, the Clean Water Act's, addresses removal:

> Nothing in this section shall be construed to prevent any department, agency, or instrumentality of the Federal Government, or any officer, agent, or employee thereof in the performance of his official duties, from removing to the appropriate Federal district court any proceeding to which the department, agency, or instrumentality or officer, agent or employee thereof is subject pursuant to this section, and any such proceeding may be removed in accordance with section 1441 *et seq.* of title 28. * * *

33 U.S.C. 1323(a).

Moreover, in two of these environmental statutes—the Clean Air Act (42 U.S.C. 7418(a)) and the Clean Water Act (33 U.S.C. 1323(a))—Congress expressly subjected to state requirements not only every "department, agency, or instrumentality" of the federal government but also every "officer, agent, or employee thereof." If Section 1442(a)(1) were read to preclude removal by federal agencies, the removability of most state court actions under these statutes would rest exclusively in the hands of plaintiffs, since they would have the choice of naming the agency or its head.[29]

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[29] For example, in two recent cases, the Pennsylvania Department of Environmental Resources (PADER) sued federal agencies alleging violations of the State's environmental laws. *PADER* v. *United States Dep't of the Navy*, Civ. No. 89-0545 (M.D. Pa. Aug. 29, 1989) (concerning cleanup of hazardous waste at a Navy facility in Mechanicsburg, Pennsylvania); *PADER* v. *Small Business Administration*, 579 A.2d 1001 (Pa. Commw. 1990) (concerning cleanup of former wallpaper factory that SBA acquired in connection with a loan guarantee). Both cases presented important issues as to the scope of the corresponding federal waiver provisions and under the Supremacy Clause. Accordingly, in each case the United States removed the action, only to have it remanded to state court. *PADER* v. *Navy*, Civ. No. 89-0545 (order filed Aug. 29, 1989); *PADER* v. *SBA*, Civ. No. 89-3954 (order filed Jan. 19, 1990). After remand in *PADER* v. *Navy*, the United States filed an action in federal court for declaratory relief, alleging, as it had in the state court proceeding, that the state court proceeding was barred by sovereign immunity and under CERCLA. See *United States* v. *PADER*, No. 90-5337 (3d Cir. Jan. 22, 1991), slip

In sum, interpreting Section 1442(a)(1) to authorize removal only by federal officers would lead to results that are "at war" with the purpose of the statute. Cf. *United States* v. *Campos-Serrano*, 404 U.S. 293, 298 (1971). The results of such an interpretation, moreover, would be far-ranging, affecting every aspect of the government's operation that is carried out through federal agencies. Finally, such an interpretation could significantly alter the balance of federal-state relations and contribute to divisiveness in those relations. For these reasons, that interpretation should be rejected.

D. Interpreting Section 1442(a)(1) To Authorize Removal By Federal Agencies Accords With This Court's Decisions Concerning Suits Against the Federal Government

At bottom, the interpretation of Section 1442 (a)(1) championed by petitioners rests on a distinction between actions by officers of an agency and actions by the agency itself—a wholly artificial distinction in this context. As explained above, Congress has eschewed such a distinction in certain statutes prescribing the circumstances under which the operation of the federal government can be judicially challenged. This Court has likewise refused to draw such a distinction where, as here, doing so would clearly thwart congressional purpose.

In *Loeffler* v. *Frank*, 486 U.S. 549, 551 (1988), the Court held that "prejudgment interest may be

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op. 4-5. The Third Circuit reversed the district court's dismissal of the United States' action, holding that the lower court abused its discretion by according insufficient weight to the United States' "compelling interest in adjudicating its sovereign immunity under federal statutes in a federal forum." *Id.* at 3.

awarded in a suit against the United States Postal Service brought under Title VII of the Civil Rights Act of 1964, * * * 42 U.S.C. 2000e *et seq.*" The Court based this holding on 39 U.S.C. 401(1), which empowers the Postal Service "to sue and be sued in its official name." See *Loeffler*, 486 U.S. at 554-558. The Court rejected the argument that this provision did not apply in Title VII suits, in which Congress required that "the *head* of the department, agency, or unit * * * shall be the defendant" (42 U.S.C. 2000e-16(c)) (emphasis added). 486 U.S. at 562 n.8. The fact that the plaintiff properly named the head of the Postal Service did not preclude him from enjoying the benefits of the provision authorizing suits against the Postal Service "in its official name." *Ibid.*

In rejecting the distinction between suits against an agency and suits against the head of the agency, the Court in *Loeffler* relied on *FHA* v. *Burr*, 309 U.S. 242 (1940). In *Burr*, the Court interpreted the "sue and be sued" clause applicable to the *Administrator* of the FHA to authorize garnishment of the *agency's* assets. *Id.* at 249-250. Although *Burr* presented the "inverse situation" of that presented in *Loeffler*—i.e., the agency was the named defendant, and the statute at issue referred to the agency head—"the same logic applies. * * * [T]he acts of the named defendant are always chargeable as acts of the person or entity" subject to the statute. *Loeffler*, 486 U.S. at 563 n.8.

A similar approach is warranted here. The Court in *Loeffler* and *Burr* was guided by the principle that the statute before it in each case was to be construed broadly in light of its purpose. *Loeffler*, 486 U.S. at 556; *Burr*, 309 U.S. at 245. So too here, the purpose

of Section 1442(a)(1) to afford the federal government the protection of a federal forum "should not be frustrated by a narrow, grudging interpretation." *Willingham*, 395 U.S. at 407. As we have explained, that purpose would clearly be thwarted by an interpretation that made the availability of a federal forum depend on whether the suit named the agency or its officers. The distinction rejected in *Loeffler* and *Burr* should also be rejected here.[30]

II. PETITIONERS' ARGUMENTS REGARDING RES JUDICATA AND NIH'S INTEREST IN THIS CASE ARE NOT BEFORE THIS COURT AND ARE IN ANY EVENT WITHOUT MERIT

Petitioners advance two arguments that are unrelated to the question on which this Court granted review and that are in any event without merit. They argue first (Pet. Br. 17-19) that the issue of removal in this case is *res judicata* and, second (Pet. Br. 19-23), that the court of appeals below improperly held

[30] This approach also accords with that dictated by modern pleading practice, as embodied in the Federal Rules of Civil Procedure. The Rules recognize that suits against government officials are, in reality, suits against the office. See Fed. R. Civ. P. 25(d). Moreover, they authorize courts to look beyond the pleadings when necessary to determine the real parties in interest in the case and to require they be made a part of the case. Fed. R. Civ. P. 17(a). The addition of the real party in interest has "the same effect as if the action had been commenced in the name of the real party in interest." *Ibid.* Applied here, these rules would justify the courts in this and similar cases in treating the officers subject to the relief sought as the real parties in interest and, on this basis, upholding the removal of such cases. See Fed. R. Civ. P. 81(c) (Federal Rules of Civil Procedure apply to removed cases).

that NIH had a sufficient interest in this case to remove it.

A. The Fourth Circuit's Decision In *IPPL* v. *Institute for Behavioral Research* Does Not Preclude Litigation Of The Removal Issue In This Case

Petitioners contend (Pet. Br. 17-19) that litigation of the removal issue in the present case is barred by the Fourth Circuit's decision in *IPPL* v. *Institute for Behavioral Research*, 799 F.2d 934 (1986), cert. denied, 481 U.S. 1004 (1987). While petitioners invoke the doctrine of *res judicata*, their contention—that the issue of removal jurisdiction was implicitly decided in *IPPL*—actually rests on the doctrine of collateral estoppel, or issue preclusion. See *Kremer* v. *Chemical Construction Corp.*, 456 U.S. 461, 467 n.6 (1982). True *res judicata*, or claim preclusion, does not apply in actions dismissed for lack of jurisdiction, for in such actions the merits of the claims are not addressed. *Hughes* v. *United States*, 71 U.S. (4 Wall.) 232, 237 (1866); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4436 (1981). In any event, petitioners' contention that litigation of the removal issue in the present case is precluded is incorrect.

The preclusive effect of a prior decision extends only to issues that were "actually litigated and determined" and "essential to [the prior] judgment." *Cooper* v. *Federal Reserve Bank*, 467 U.S. 867, 874 (1984). Thus, a prior judgment deciding one issue of jurisdiction does not preclude later litigation of a different jurisdictional issue. See, *e.g.*, *GAF Corp.* v. *United States*, 818 F.2d 901, 913 (D.C. Cir. 1987); *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1191 (D.C. Cir. 1983) (relitigation barred "at least to the extent appellant seeks to base jurisdiction on [28 U.S.C.

1332]."); *Stewart Securities Corp.* v. *Guaranty Trust Co.*, 597 F.2d 240, 241 (10th Cir. 1979) ("the doctrine of *res judicata* precludes a subsequent relitigation *of the same jurisdictional issue* between the parties.") (emphasis added).

The issue presented here—whether NIH could remove a state court suit under Section 1442(a)—was neither raised nor necessarily decided in *IPPL*. In *IPPL*, petitioners presented a federal claim as well as state-law claims. The case was therefore removable under 28 U.S.C. 1141, and NIH removed it without opposition. 799 F.2d at 937. Neither party raised the issue of removal under Section 1442, and the court of appeals did not discuss it. Rather, after dismissing petitioners' federal claim, the court merely declined to exercise pendent jurisdiction over the state law claims on the ground that "state claims should usually be dismissed if the federal claims have been dismissed before trial." *Id.* at 941 (citing *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 726 (1966)). The Fourth Circuit's decision to deny pendent jurisdiction cannot reasonably be interpreted as an implicit ruling on an entirely separate issue of removal jurisdiction that was not presented to the court.

B. NIH Had A Sufficient Interest In This Case To Remove It

Petitioners contend that NIH's interest in this case was too attenuated for it to remove this case. But petitioners do not dispute that this suit was "commenced against" NIH for purposes of Section 1442(a)(1). Nor do they dispute that NIH alleged federal defenses that satisfied the "under color of * * * office" requirement of that provision. See *Mesa*, 489

U.S. at 129-134. Thus, the legal basis for petitioners' view that something more is required to invoke Section 1442(a)(1) is obscure; they cite no statutory provision or case law to support this view. In any event, NIH plainly has a substantial interest in this case.

Petitioners' own conduct in this case defeats their contention that NIH's interest in this case is insufficient. They voluntarily named NIH as a defendant in this case. They devoted their complaint to allegations of misconduct by NIH with regard to the care and custody of the monkeys. They repeat these allegations in the statement section of their brief to this Court. Finally, they have sought injunctive relief directly against NIH, its employees, and its agents.

In addition, NIH's interest in this case is clear from its statutory mandate. 42 U.S.C. 281-284c, 289-290a. The research by IBR that sparked the present controversy was "research * * * supported by [NIH]" (42 U.S.C. 241, 282(b)(3)) that must comply with regulations and guidelines promulgated by the Director of NIH governing, among other things, the care and custody of research animals (42 U.S.C. 289-289b, 289d). The planned euthanasia that petitioners have sought to enjoin likewise is subject to these guidelines and is designed to provide the type of scientific information that NIH was created to foster. NIH clearly has a vital interest in any suit that, like this one, seeks to prevent it from carrying out its statutory mission.[31]

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[31] For this reason, petitioners' fact-bound contentions regarding which respondent had physical custody of the monkeys at various stages of this litigation are irrelevant. In any event, there was ample evidence in the record before the district establishing that NIH, at considerable expense, acted

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

BARBARA L. HERWIG
MATTHEW M. COLLETTE
Attorneys

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as primary custodian of the monkeys after the monkeys were transferred to NIH in late 1981. See NIH App. 1a, 2a; IBR App. 6a.

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